CHAPTER 1

EVOLUTION OF LAW FROM THE
PRIMITIVE STATE TO MODERN SOCIETY

"The virtues in the state were the qualities of the citizen, as such, considered as playing the special part in society for which he was qualified by the predominance in his nature of the philosophic, the pugnacious, or the commercial spirit. But all three elements exist in every individual, who is thus a replica of a society in miniature" Plato

Modern man lives in an organised political society. Such societies are constituted with a definite territory which is called a state. At the time of formation of such states, whether old, tribal or modern maintenance of peace and order were considered as the main functions. Defence against aggression from outside was another duty of the sovereign state. For that purpose might of the entire society had to be consolidated and the organisation claimed absolute authority over its population. The sovereign head is supposed to exercise efficient control over the people and to resist any intrusion thereon. There were also established courts, which were given the authority to settle the disputes between individuals and groups within and outside state. Head of the state had the authority to make laws on any matter and such authority was unquestionable.

1 The Republic of Plato-Trans. by Francis Macdonald Cornford, Oxford University Press, London, 1975 p.139
These mode of approach towards law and justice in the medieval period were ideologically determined by socio-economic considerations, though not as the result of the knowledge of such ideological background. Even the lawyers and jurists thought it that self contained in the social system. During this period law was not deemed to have any relation with social ideology or to put it otherwise, law was not consciously looked up on as a tool to serve the needs of the entire polity. Justice, hence have no relation with socio-economic interests. So there was no reflection on social or economic justice. This state of affairs reached a climax with the dawn on the 19th century that is before the industrial Revolution. The expansion of commerce and industry during the industrial revolution brought a drastic change in the socio-economic conditions in Europe and outside. Capitalists increased their production through textile mills and factories. Exploitation of the workers or proletariat was a natural corollary of this situation. The domination and oppression by a few over the large working class brought forth powerful critics like Marx, who made political and philosophical treatises for justice in economic and social aspects. In such a situation, agitations emerged from proletarian ideologies and its outcome on society compelled sovereign powers to change their view about the functions of state. As the plea for social justice on economic interests gained strength, subsequently the state became more and more involved in the socio-economic life of the people. Concept of sovereignty also changed and it came to be recognized that the ultimate
authority in the state rested with the people who were therefore entitled to set
laws for common observance in the state. In the changed outlook law was no
more a command of a superior to his subjects. It became an instrument of
social peace and social progress and one developed by the people for
themselves. Representatives of the people began to meet from time to time to
formulate laws. It was realised that law cannot afford to ignore the rational
struggle in social life.

At present enactments are made in all societies to protect workmen
against the dangers of modern industrial work, to protect the public against
the risks of modern traffic, to protect consumers against dangers of mass
production irrespective of any evil intent, or negligence on the part of the
particular employer, or producer respectively.

The standardisation of industry, business and employment, the growing
predominance of collective bargaining, the development of transport and
media of communications, the increase of public welfare and above all the
growth of state controlled economy tending towards socialism etc brought
forth a new social order that demanded a new technique in the legal system.
The expansion of state-control over more and more matters that were
formerly left to private concern necessitated a rapid change in public law also.
As law becomes multifarious and complex it developed a professional
technique. The effectiveness of law thus depends upon the system, which
innovates new specialised areas and modification according to the social needs.

DEVELOPMENT OF THE INDIAN LEGAL SYSTEM

Just as in the case of the ancient European societies, ancient India also seems to have had no organised system of judicial disposal of disputes. The administration of justice was a private affair settled by fight and might. But later it came to be administered by well-settled organs of the society such as ‘Saba’, ‘Samiti’ etc mentioned in ancient scriptures. Though such bodies were essentially for tribal governance they also handled the task of jurisprudence. The function of the tribal head (King) vis-à-vis the disposal of justice has been dealt with in ancient treatise on law like that of Manu, Narada and also in Mahabharatha. According to Mahabharatha the king who is the one who dispenses justice should not deviate from the path of truth and also he should be a cultured person with an intellectual bent of mind. The Naradiya Dharma sastra says

“Judicial procedure has been instituted for the protection of human race, as safeguard of law and order to take from kings the responsibility for crimes committed in their kingdom when humanity was strictly virtuous and veracious. There existed no quarrels, hatred or selfishness. Virtue having become extinct from them, judicial proceedings have to be established and the king having privilege of inflicting punishment has been instituted the judge of lawsuits”.

Agarwala, 1993, p.3.
It was the king's duty to punish the lawbreakers and ensure what conditions were conductive for the smooth functioning of the society. Fear of punishment compelled the people to honour the rights of others. Every person had the right to receive justice and it was the state, which delivered it to him. The legal systems which then existed gave no power of legislation to the king. It was believed that a king should decide cases according to the rules of sastras. In the absence of a provision in a text he should follow the usual practice or tradition. King should never act according to his own fiat. Such an action on the part of the King causes danger to him and brings ruin to the people. The king was only an upholder and promulgator of law and the administrator of justice. King presided over the highest court of the state but his duties were performed as prescribed in the law books known as codes.

The concept of 'rta' (the existence of an order in nature) which was originated and developed in Vedic age, led to an establishment of social order in nature, culminating in the development of law for regulating human relations. The thought that individual members of the society must get justice according to law of the land, and that their rights must be safeguarded resulted in introducing a system of judiciary. It was through the state that justice could be dispensed to the society and dispensing justice thus becomes the most important function of the king. In such a system the conception of state and legal system are intimately linked. The state was the authority to implement law and the authority to give impartial justice to the people. The gradual
development of the system to an elaborated and refined one took place with the help of various contributors and lawgivers. The major stages of development are traced as the Vedic i.e. the Pre-Mourya, Maurya and Post-Mourya (i.e. Gupta) periods. The state of affairs in the pre-Maurya periods is often traced in the Vedas, Upanishads, Jatakas etc. At that time jurisprudence or the legal systems (Vyavahara dharmastra) was embedded in Dharma as propounded in the Vedas, puranas, smritis and other works on the topic.

Dharma is a Sanskrit expression of the widest import. There is no corresponding word for Dharma in other languages and even in Sanskrit it is interpreted in many different shades of meanings. The word can at best be explained rather than being defined. The word Dharma has a wide verity of meanings and a discussion of a few of them would enable us to understand the width of the expression. It is used to denote justice. What is right in a given circumstance moral, religious pious or righteous conduct, being helpful to living beings, giving charity or alms, natural qualities, characteristics and inherent properties of living beings, duty, law and usage or custom having the force of law and also a valid Raja shasana (Royal edict) all these were understood by dharma.

In Mahabharatha there is a situation that, on being questioned by Yudhishtira about the meaning and scope of Dharma, Bhishma states it is most difficult to deliver Dharma, Dharma has been explained to be that which
helps the upliftment of living beings. Therefore that which ensures welfare (of living beings) is strictly Dharma. The learned Rishis have declared that which sustains is Dharma”.

In Taittiriyopanishad Dharma is explained as follows.

“Dharma constitutes the foundation of all affairs in the world. People respect those who adheres to Dharma. Dharma insulates man against sinful thoughts and actions. Every thing in the world is founded on Dharma.³

Based on the principles of Upanishads and other Vedic texts Shastras and Smriti played a vital role in the judicial sphere. They also increased the judicial power of the king. However references in the Rigveda on the powers of the king shows that early Vedic kings in return to tax paid to him (Mostly through voluntary offerings) conducted the judicial functions of the society. Hence maintenance of law and order, though of a primitive nature, was within the duties or powers of a king. Since polity was tribal, correspondingly, the administration of law and order and jurisprudence as a whole was fairly simple when compared to later standards.

JURISPRUDENCE AS EXPOUNDED IN KAUTILYAS ARTHASAstra

The Judicial system in the early period was more or less determined by Royal legislation. The socio-economic and political aspects of the evolution

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of a democratic tribal polity into a monarchic one is not intended here. The reasons for codification were

(i) To preserve the king's person and his rights
(ii) To ensure the benefit of good governance and
(iii) To prescribe punishments for such crimes which were not included in the texts.

Arthasastra as it exists today is believed to have been primarily a work of Kautilya with later interpolations. However it is believed that the text reflects the Mauryan epoch of jurisprudence though it is not a text on the history of Mauryan polity. ‘Arthasastra’ is basically a text on statecraft and it includes an elaborated legal code. It provides for the safeguard of life and property of citizens against encroachment, defamation, assault and attempts on life and property as well as the assaults on the liberty of a person and atrocities from the part of Government officials. Kautilya's conception of law, though stringent was comprehensive and all embracing in it's structure and content. According to him law is the eternal order, it was justice and duty. Danda or punishment is the tool for governance of the state. Laws were made to synchronise with the needs of the people and their economic conditions. Kautilya said, “law is a royal command enforced by sanction and the regulating factor of all kinds of human activities”. The Mauryan judicial
system continued without change till the death of Bindusara. Significant administrative changes were introduced during the period of Ashoka. The changes included new judicial officers as well as extension of their duties. Ashoka’s edicts contain glimpses of the jurisprudence of his period, which is by and large in coherence with Kautilyas views. Jurisprudence as a whole had consolidated in to a codified form by the end of the ancient period though the same was not very rigid in nature.

**NATURE OF LAW IN THE MEDIEVAL PERIOD**

With the establishment of Slave Dynasty in Delhi by Qutb-din-aibak there began the infiltration of Islamic jurisprudence into Indian legal system. The sources of Islamic law are the Quran and Sunnah. Quran is the holy book. Prophet is also considered the best interpreter of Quran. There are two other sources, which developed in order to meet the needs of expanding Muslim society. They were

1. Ajma (Consensus of opinion among those who were learned in Quran)

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4 (Bindusara was the second Mauryan emperor (297 - c.272 BC) after Chandragupta Maurya- Wikipedia The free encyclopedia 2006 may23, http://en.wikipedia.org/wiki/Bindusara)

5 dynasty The Slave dynasty served as the first Sultans of Delhi in India from 1206 to 1290. The founder of the dynasty, Qutb-ud-din Aybak, was a Turkish ex-slave of the Aybak tribe who rose to command the armies and administer the territory of Muhammad Ghori in India- Wikipedia The free encyclopedia 2006 may23, http://en.wikipedia.org/wiki)

6 In Islam, the Arabic word sunnah has come to denote the way Prophet Muhammad, the Messenger of Allah, lived his life. The Sunnah is the second source of Islamic jurisprudence, the first being the Quran- University of Southern California, USC-MSA Compendium of Muslim Texts, 2006 May 23, http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/
2. Qiyas (Analogical reasoning having due regard to the teachings of Mohammed)

In the mean while divergent opinion taken on various provisions of Quran by eminent Muslim jurists caused the emergence of four well developed branches of Muslim law. They were

2. Malika school founded by Malik Ibn Aus (713-793 AD)
3. The shafi school Muhammad ibu Idris ash–Shafii (767-820 AD) and

Among these schools Hanafi school became very popular in many countries including India. Shafi School also succeeded in finding its followers in India.

Muslim law became the law enforceable in India with the establishment of Slave dynasty. The law covered various subjects such as inheritance, gifts, marriage, divorce, wakfs (Pious endowments with reference to the subject matter of trusts) etc which constituted the personal civil law governing the Muslims and also the Muslim criminal law which described the offences punishable and also the penalties for various offences. During the Medieval period the Muslim civil law was embraced by the state. This was to

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some extent made enforceable during the British rule and the same continues to be in force by virtue of Art 372 of the constitution

Art.372- Continuance in force of existing laws and their adaptation.—(1) Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

(2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law.

(3) Nothing in clause (2) shall be deemed—

(a) to empower the President to make any adaptation or modification of any law after the expiration of three years from the commencement of this Constitution; or
(b) to prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause.8

It was in force prior to the commencement of the constitution and subject to the provisions of legislation enacted by the appropriate legislators.

Muslim criminal law came to be enforced for the purpose of administration of criminal justice. During the Mughal period this law continued to be in force in all areas ruled by the Muslim rulers. Particularly it continued for over hundred years after the taking over of these areas by the British. Aurangazeb9 entrusted the preparation of a comprehensive digest of Muslim criminal law to eminent Muslim theologians. This was titled as Fatwa-I-almagiri. The Muslim criminal jurisprudence treated criminal law as a branch of private law than as a part of public law. The principle governing the law was more in the nature of providing relief to the person injured (as in civil matters) rather than to impose penalty for the offence committed. To a certain extent crimes against God were treated as offences against public; moral, and other offences were treated as offences against individuals. Though for the offences against individual the state imposed penalty, still the purpose was only to secure relief to the aggrieved rather than safeguarding the

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9 Aurangazeb (1618-1707), was the ruler of the Mughal Empire from 1658 until 1707)
interest of the society. It was for the private person to move to the state machinery against such offences and the state could not suo-moto cognise at the same.

Offences like murder etc which are treated by modern law as severe crime was treated as an offence against the individual where as drinking wine was considered as an offence against the society and therefore it was treated as a public wrong. The law which prevailed in that period which vested in the heir of the murdered person to initiate action against the murderer and the provision to have the matter compromised was illogical, unreasonable and was had serious consequences such as promoting the commission of such offences.

MUGHAL JURISPRUDENCE

The development of Mughal legal system can be divided into three distinct periods.

a. The period preceding the reign of Akbar (1542-1605)
b. The period of Akbars rule
c. Post- Akbar period till the British rule.

As strict Islamic law was found inadequate for the needs of an expanding and mixed society, consensus was added as another source for law. Prior to Akbar’s reign traditional Muslim law was applied even in matters of
judicial procedure. Difficulties in the implementation of this method led to the gradual realisation of its inadequacy and consequently compromises and relaxation were made in its administration.

However real change came during the reign of Akbar when he substantially repealed discriminatory laws that were against non-Muslims. He established a uniform system of justice for all though this was partly reversed by his successors. Administration of justice in the Mughal period was quick and inexpensive. Adjudication was largely based on the facts in hand. Emperor was easily accessible to the poor and hence corruption was less in the field of justice. Such quick dispensation of justice seems to be barbaric from the modern point of view but the same was a definite advance over the previous systems in so far as a strict adherence to impartiality was expected from the judge. The whole system was by and large impartial, prompt, inexpensive and popular.

JURISPRUDENCE DURING THE COLONIAL PERIOD

Even after establishing important trading centres in Bombay, Calcutta and Madras during the seventeenth century the British East India Company by and large remained as merchants who obeyed the Indian authority. However the British subjects were subjected to their own laws which were administered by their officers. In 1601 the first charter was granted by Queen Elizabeth 1 which conferred up on the company the right to make reasonable laws as well
as to execute those laws. This included punishment for non-conformity to the laws.

In 1618, Sir Thomas Roe who was the ambassador of James I to the Mughal court formally secured the privilege of allowing the English residents to approach their own officers for adjudication of cases arising among them. This was done during the reign of Jahangir (1569-1627). Charter of 1661 issued during the period of Charles II empowered the governor— in council of the company to act as judge for the disputes arising within their jurisdiction. Then came the charter of 1683 which gave the company full power to make peace and war. This charter also provided for establishing a court of judicature to be held at such place or places as the company might direct. In 1726 the crown by letters patent established mayors courts on English pattern at Madras, Bombay and Fort William (Calcutta). The courts had the power to hear all the civil suits and other similar disputes. In 1753 by letters patent ‘courts of request’ were established at each of the three presidencies for the determination suits in which the amount involved did not exceed RS 20.[Agarwala, 1993. P.36]

In 1675, after the battle of Buxar, East India Company got territorial sovereignty and Sir Robert Clive succeeded in obtaining the right of Diwani over Bengal, Bihar and Orissa from the then ruler Shah Alam. However the Nizamath or criminal jurisdiction remained with the Nawab at Murshidabad.
The Company was to collect revenue, maintain the army and to administer the civil justice. However the company kept away from interfering in the civil laws mainly due to the lack of knowledge about the state of affairs, except for the purpose of revenue administration. The courts mainly followed the Islamic criminal laws.

The jurisdiction of the Mayor's courts and other crown courts in Calcutta did not cover Europeans who lived outside the cities concerned. However the regulating act passed in 1773 provided for the establishment of a Supreme Court at Fort William, Calcutta as the Supreme Court of judicature. They had full civil, criminal and ecclesiastical jurisdiction and were empowered to administer English law to all British subjects and persons in the employment of the Company situated everywhere. At Madras and Bombay Mayors courts based on the British Municipal Model existed till 1797 till they were replaced by Recorders courts, subject to the same limitations as were imposed on the supreme court at Fort William by the act 1781. The system of civil courts established by Lord Cornwallis in Bengal was adopted in Madras presidency in 1802. By regulation III of 1807 the governor ceased to be judge. In 1826 the village heads were appointed as Munsiffs. In 1843 the provincial courts of appeal were abolished and new zilla courts were established. The plan adopted by Warren Hastings with regard to the administration of criminal justice was the retention of Mohammedan law and tribunals under the general control of the Nawab but subject to the superintendence by the
company's government. In 1861 Indian high courts Act was passed to establish, by letters of Patent, three high courts at Madras, Bombay and Fort William. As part of the unification process regarding the criminal justice code of criminal procedure was enacted in 1872.

The legal system introduced by the British was more based on suitability to local conditions as seemed fit by them than on theoretical reasonableness. It was by nature defective and with the raise of National movement the resistance to the glaring defects of British jurisprudence grew stronger. One of the early demands of the Indian National Congress was the separation of judicial function from the Executive power. However the system was continued since it served the colonial interests.

Legal system in the British period was moulded more or less in the British pattern but with a general purport to serve the Interests of the British Capital in India. It was by and large oppressive and biased. Establishment of various courts and the concentration of power on the courts had two main aims

1. To take over the judicial power from the existing rulers and religious heads.

2. To enact and codify rules in such a manner as to help the British sovereign to spread its power all over India.
On attaining these aims the British sovereign began to make laws which were not in contradiction with the Indian sentiments. This change was very much evident after the revolt of 1857.

Codification of laws in India

Though British Government gradually imposed their judicial system in India, discrepancy in the application of a foreign law upon the Indian people remained. The position in India in the beginning of the Nineteenth century was as follows.

(a) There was Hindu Law, which included smritis commentaries and digests and in addition to it usages and custom which had to be applied to Hindus on several areas.

(b) Muslim law and usage which was applicable to Mohammedans

(c) English common law and statutes the application of which was more difficult.

(d) Charters and Letters of patents which made provisions regarding the application of various laws.

(e) Regulations made by local Governments on various topics some of which were applicable to presidency towns, other applicable generally to all the areas.
(f) There were several circulars and orders issued by Nizamat Adalats and Diwani Adalats. (In British India Company’s governor WARREN HASTINGS bestowed magisterial power on the collectors and appointed native judicial officers called sadar amin in the district civil courts. Sadar Dewani Adalat initially constituted with the governor general and members of his council and subsequently with experienced senior English officers, heard appeals from the decisions of the district or divisional civil courts Sadar Nizamat Adalat constituted with the self same judges of Sadar Dewani Adalat heard appeals from circuit courts of sessions).

(g) Judges made laws giving conflicting interpretations and applying different laws to different classes of persons applying the principles of justice equity and Good conscience.\textsuperscript{10}

Due to the influence of Bentham, who gave theoretical and practical support to the codification of laws, Britain made initiation towards codification. Like wise the famous jurists in Britain pointed out the necessity of codification of law in India. The jurist Libretto said that India has been the most successful field of English codification.\textsuperscript{11}

\textsuperscript{10} M. Rama Jois, 1990, p. 63.
\textsuperscript{11} Sir Courtney Ilbert 1901, p. 129
While moving a resolution in connection with the renewal of the charter of the company in 1833 Charles Grant quoted the following view expressed by the judges of the supreme court at Calcutta in their letter to Governor General of Calcutta about the state of law in Bengal.

"In this state of circumstances no one can pronounce an opinion or form a judgment disputed right of persons respecting may not be raised by those who may choose to call it in question: for very few of the public or persons in office, at home not even the law officer can be expressed to have so comprehensive and clear a view of the present Indian system, as to know readily and familiarly the bearings of each part of it on the rest. There are English Acts of parliament, specially provided for India, and others of which it is doubtful whether they apply to India wholly or in part or not at all. There is the English common law and constitution, of which the application is in many respects still more obscure and perplexed; Mohammedan law and usage; Hindu law, usage and scripture, charters and letters patent of the crown; Regulations of the Government, some made declaredly under Acts of parliament particularly authorizing them, and others which are founded as some say, on the general power of government entrusted to the company by parliament; and as others assert on their rights as successors of the old native Government. Some Regulations require registry in the supreme court; others do not; some have effect generally Throughout India, others from the Nizamat Adalat, and from the Dewani Adalat; treaties of the crown, treaties of the Indian government besides inferences drawn at pleasure from the application of the 'droit public' and the law of nations of Europe, to a state of circumstances which will justify almost any constructions of it, or qualification as its force."

According to him Indian legal system had the following three defects

(a) in the laws

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Moreover in the course of debate on the charter Bill of 1883 McCauley forcefully brought out the utter confusion and multiplicity of laws prevailing in India and the risk involved in relying upon the opinion of Pandits for the interpretation of Hindu Law, and upon the Kazis for the interpretation of Muslim law. The Act of 1833 was enacted incorporating provisions to enable codification. In the charter provisions were made for the establishment of an All India legislature having legislative authority throughout British India and for the creation of a new office of a law member and for the appointment of law commission. According to the charter, first law commission was appointed in 1835. McCauley, who was a member of the House of Commons and a Barrister, was appointed as the chairman. He continued upon 1837 and the commission worked till 1843. The most significant contribution of the first law commission was the preparation of Indian penal code for purpose of codification of penal law in India and the Lex Loci Report on the question of law applicable to persons other than Hindus and Muslims. There is reasonable background behind the Lex Loci report. At that time there were several sets of laws governing the same subject matter depending upon religion or nationality of the parties concerned i.e., Hindu Law for Hindus, Muslim Law for Muslims, and the English law for the British. On the basis of Justice, Equity and Good conscience the courts were given discretion to mould and
apply legal principles taken from any system of law having regard to the facts and circumstances of the case. There was no 'Law of the land' applicable to all the persons except for well-defined classes like Hindus and Muslims. The position of the resultant groups was extremely anomalous as the law applicable differed from person to persons depending upon his religion or nationality. After two years of appointment, law commission's attention was drawn to the uncertainty about the law applicable to those who were neither Hindus nor Muslims. The commission submitted Che Lex Loci (Law of the Land) report on the question, in which the recommendation was made to declare law of England as the law of land even outside the three presidency Towns. The commission stressed the need of there being a law of land and further opined that English Law could be the obvious choice for that purpose.

The Lex Loci was meant for the inhabitants in India and not to Hindus and Muslims so long as they remain in the respective religion. The subject matter of Lex Loci Report and the draft act were full of complications and was likely to affect large sections of the people, the report was sent for eliciting the opinion from all the local Governments, the supreme courts, sadar Adalats and other officers of experience as the as the Government did not like to proceed in haste. The policy underlying the report was to have a law at least common to all the inhabitants except Hindus and Muslims. The report received support as well as criticism. There was criticism against the assumption made by it that English Law was already being administered by
the Adalats in Moffussil. After seeing the stiff resistance to it the Government thought it was provident to defer action on the Lex Loci Report. However a portion of the draft Lex Loc Act, contained in clauses 10, 11 and 12 for dealing with the problems of native converts was accepted and legislation was put through in the form of caste Disabilities Removal Act, 1850. But Maddock, a member of the council, opposed the passing of the Act.

A quote:

"Although the proposed law propounds a principles which theoretically must be admitted as just that no man shall suffer loss or injury on account of his religion, it is regarded by the Hindus as partial and unjust because it will operate only in one direction, and in favour of those who leave the religion of their forefathers to embrace the religion of those who make the law, and in reality, though in the case of converts from Hinduism to Christianity, for neither Mohammedans nor Christians can become Hindus and we rarely hear the former becoming Christians."  

The second Law Commission

In exercise of the powers created under the charter Act of 1853 the second law commission was appointed in England. The commission submitted two reports in which importance was given to the reconstruction of courts and judicial Administration. Moreover, the commission expressed it's view against the codification of Hindu Law and Mohammedan Law.

According to the commission both the laws were routed in the respective religion and beliefs and that any attempt to codify these laws were likely to injure the religious sentiments of these classes and would be met with resentment. But minority in the commission expressed their dissent. They were in favour of having Lex Loci as applicable to all persons. But the recommendation of the majority laid the firm foundation in the process of codification of law in India. The commission's cautioning against any attempt to codify Hindu and Mohammedan law was also accepted and scrupulously followed.

Commencing from the period when the Charter Act of 1833 was enacted the question of codification of law had been under the active consideration of the British Government. The British reived a rude shock in the form of the revolt of 1857, which had 'the fear of loss of religion' by the Indians as on of its main causes. On account of this the British took over the affairs of the Government of India. In such a situation quick actions were taken and the following laws were passed by the Indian legislature.

(1) The code of civil procedure Act, VII of 1859
(2) The Limitation Act, Act X of 1859
(3) The Indian Penal code 1860
(4) The code of criminal procedure 1861.
These laws were made applicable to all persons and were a great advance on
the laws preceding them, though there were some defects inherent in them.

In 1861 the Third Law commission was appointed. The commission
was directed to frame a body of substantive law using, the law of England as
the basis, which should become the law for India on that particular subject.
There were also a direction to consider and report on such other matters
relating to the reformation of laws of India as might be referred to them by the
secretary of the state. The commission drafted and submitted seven reports
regarding various laws.

First report is regarding the law of succession, and it was enacted with
certain codification into Indian succession Act 1865. The commission based
the draft of succession Act on the law of succession in England; But there
were certain deviations like the distinction maintained in English law by
providing two systems of law of succession that is one for immovable and
another for moveable was not adopted. The Act was to apply generally for all
testamentary and intestate succession except Hindus, Buddhists and
Mohammedans. Sikhs and Jains were included in the term Hindu.

In the Second report, which was submitted in 1866, the commission
incorporated the draft of the law of contract. This draft included the
provisions covering sale of moveable property; partnership and indemnity and
guarantee though the bill was sent to India in 1867 but because of the delay in enacting it the Law Commission send protest letter and registration.

The British administration in India which was by the by the time permitted to make it's own decision introduced the Indian contract Bill in 1871 and this became the Indian contract Act of 1872. Two related Acts were passed after the enactment of contract Act. They are Indian sale of good Act (1930) and Indian partnership Act (1932).

The commission in 1867 submitted third report containing the law of negotiable Instruments, which was approved in 1881 by fourth law commission and enacted as the negotiable instruments Act 1881.

In the same year commission also submitted its Fourth report on law of specific performance and this was enacted as the specific relief Act in 1871.

The Law regarding the Evidence was uncertain during the period. The supreme courts at Bombay Madras and Calcutta and also the earlier records courts at Bombay and Madras followed the English law of Evidence. But the situation in the Moffussil was uncertain, they were not found to apply the English law of Evidence but they had the discretion to apply the same if the same were found to be just and equitable. Some customary laws of were also considered.
The Privy Council observed into the difficulties in enactment of British laws and stated:

"It is perfectly manifest that the practitioners and the judges of the native courts in the East India have not that intimate acquaintance with the principles which govern the reception of evidence in our tribunals; we must look to the essentials of justice of the case, and not hastily reject any evidence because it may be accordant with our own practice".\(^{14}\)

In the fifth report law commission codified the law of evidence on 3rd August 1869. As the bill was found to be incomplete the law member Fames Stephen prepared a new Bill. It was presented to legislative council in 1871 and was enacted if 1872. The sixth report the commission dealt with the law on Transfer of property. The main object of the law was to regulate by law the transfer of property between living persons and to bring it into harmony with these rules regulating the devolution of property on death. It was not immediately made into an Act. It went before the Fourth Law Commission for revision.

According to the fourth law commission

"The function of the bill was to strip the English Law of all that was local or historical and to mould the residence into a shape in which it should be suitable for Indian population and could easily be administered by non professional judges. Read with the contract Act, this bill conveys almost the whole of the ground which could be profitably occupied law relating to transfer into vivos of interest in properly and for the convenience of the practitioners it could hardly be enacted in a more accessible form."\(^{15}\)

\(^{14}\) Cited in M. Rama Jois, 1990, p.76.

\(^{15}\) M.P.Jain, 1996, P 676-677.
Though the criminal Procedure code was already been enacted in 1861, the commission in its seventh Report recommended the revision of the code. The 1861 Act was replaced by Act of 1872. But this Act did not apply to the presidency Towns viz, to High courts in their original jurisdiction of Bombay, Madras and Calcutta in 1876 secretary of State for India instructed the Government of India to revise the Act and to evolve a complete criminal procedure code. Whitely stokes undertook this task and due to his effort the criminal procedure code of 1882 was enacted.

Several laws were enacted covering important branches of law. Still there remained certain branches of law which required codification. The fourth law commission which was appointed in 1879 did some more work on this direction which resulted in the enactment of negotiable instruments Act in 1881 and the act on Trust and Transfer of property and Easements in 1882. Though the Indian civil wrongs Bill' was also prepared it was not enacted. Fourth law Commission was the last to be appointed in British India. McCauley who headed and inspired the First Law commission in 1833 initiated the process of codification. This process continued till 15th November 1879 on which date the last commission submitted its report. On the whole the conclusion is irresistible that codification has been proved to be very much beneficial to the Indian people. With regard to benefits of codification Stephens said.
"The best illustration of the advantages of this state of things is supplied by the Indian Penal code do not hesitate to say and I speak with much experience of the subject that a young man of good capacity would get a far better and more scientific notion of criminal law in general and of the Indian criminal in particular from a week's study of the penal code than he could get from any amount of study of such book as Rosco's criminal pleading, Archibold's criminal practice or even Russel or crimes. The penal code might be improved in several important particulars both in substance and form, but no one who has not professional acquaintance with the difficulties of the English criminal Law, can possibly Measure the importance of the improvement which it has effected.16

Though the codification took place in several branches of law the whole area of substantive law could not be covered during the British period some of the important branch of law which was not covered was the law of civil wrong or torts. Another which remained unlauded was the proposal to prepare a civil code in which all the acts should form chapters.

16 Cited in M.Rama Jois. 1990, p.84.